

GENEVA BARRY ET AL.

IBLA 81-116

Decided April 9, 1981

Appeal from letter decisions of the District Manager, Bureau of Land Management, Vale, Oregon, retaining custody of wild free-roaming horses for purposes of readoption. OR 1840.

Motion to dismiss denied; application to strike denied; hearing ordered.

1. Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

2. Federal Land Policy and Management Act of 1976: Wild and Free-Roaming Horses and Burros--Hearings--Rules of Practice: Hearings

Where the Bureau of Land Management has retained custody of wild free-roaming horses, adopted pursuant to the Act of December 15, 1971, as amended, 16 U.S.C.A. § 1331 (West Supp. 1980), on the basis that the horses have been commercially exploited and the case presents substantial issues of fact, the assignees under the original cooperative agreements are entitled to a hearing before an Administrative Law Judge.

APPEARANCES: William F. Schroeder, Esq., Schroeder & Hutchens, Vale, Oregon, for appellants; Eugene A. Briggs, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Geneva Barry, Deward Gill, Gayle Sword, and Ralph Stephens have appealed from letter decisions of the District Manager, Bureau of Land Management (BLM), Vale, Oregon, dated October 8 and 14, 1980, retaining custody of five horses for purposes of readoption. ^{1/} The basis for these decisions was explained in subsequent letters to appellants, dated October 22, 1980:

The reason I am retaining custody of these animals, is that our investigation revealed that these five horses, identified by the freeze mark, as being wild horses protected under the Wild Horse and Burro Act were being used for commercial purposes. All of these horses were determined to be present in the Vale Rodeo arena holding corrals, intermingled with other rodeo stock, and some were apparently run through the arena before a paying crowd. This use constitutes commercial exploitation of wild horses which is in violation of the terms of the cooperative agreement under which these animals were adopted.

The five horses were seized by BLM personnel at the Vale Rodeo in Vale, Oregon, on July 4, 1980. At the time they were in the custody of appellants Gill and Stephens. Subsequently, BLM attempted to identify those persons who had adopted the horses under cooperative agreements. On October 30, 1980, in a memorandum to the file, the District Manager indicated that "[b]y using face markings, coloration, sex, etc. (the brands were not complete)," BLM had "tentatively identified" the horses as having been adopted by appellants. In his decisions, the District Manager indicated that the identifications were not positive and concluded: "Therefore, I am notifying all those persons I think have a direct interest in the future events surrounding the horses."

There seems to be no doubt that the five horses seized at the Vale Rodeo were horses adopted pursuant to the Act of December 15, 1971, as amended, 16 U.S.C.A. § 1331 (West Supp. 1980). They all bore a BLM "freeze mark." However, the record is unclear as to whether appellants were the actual assignees, under BLM cooperative agreements, of the five horses seized. As we herein order a hearing this matter, this must be one of the questions to be answered.

^{1/} The notice of appeal indicates that two parties in interest are deceased. It states: "Steven Sword is deceased and his widow is Gayle Sword, Lucille, Oregon; G. Gill is deceased and his transferee is D. Gill." The letter decision addressed to Deward Gill was dated October 8, 1979. Letter decisions to the other appellants were dated October 14, 1980.

The Act of December 15, 1971, as amended, supra, provides for the protection, management, and control of wild free-roaming horses and burros on public lands. In relevant part, the Act provides for the control of overpopulation by the removal of excess animals from the public lands; specifically:

The Secretary shall cause such number of additional excess wild free-roaming horses and burros to be humanely captured and removed for private maintenance and care for which he determines an adoption demand exists by qualified individuals, and for which he determines he can assure humane treatment and care (including proper transportation, feeding and handling). [Emphasis added.]

16 U.S.C.A. § 1333(b)(2)(B) (West Supp. 1980).

The implementing regulations, 43 CFR 4740.4-2 (44 FR 76986 (Dec. 28, 1979)), elaborate further on the "private maintenance" of wild free-roaming horses:

(d) Before wild free-roaming horses and burros are transferred, the applicant shall sign a cooperative agreement that incorporates provisions for custodial maintenance including but not limited to provisions for proper maintenance of the animals and protection from inhumane treatment and commercial exploitation.

(e) If the authorized officer determines that an adopted wild free-roaming horse or burro is being commercially exploited, inhumanely treated, or treated in a manner that violates a provision of the cooperative agreement, he may take immediate possession of the animal. [Emphasis added.]

Finally, the "cooperative agreements" signed by appellants on November 10, 1978, 2/ provide that: "Maintenance, as herein required, shall mean proper care and protection of the animals under humane conditions for their lifetime. None of these animals, or their remains, may be sold or used in any way for commercial exploitation." (Emphasis added.) The agreements also provide for termination of the agreement by BLM "after due notice in writing because of assignee's default or violation of any of the terms or provisions of this agreement." The decisions appealed from acted as such notice and appellants' cooperative agreements have effectively been terminated.

2/ Appellants' cooperative agreements were signed before the effective date of the regulations in 43 CFR 4740.4-2. However, that section also provides that: "(g) Persons, organizations, or agencies who receive wild free-roaming horses or burros that have been previously transferred for private maintenance or adoption shall be subject to all the provisions of these regulations." (Emphasis added.)

It is the essence of BLM's decisions that the horses in question have been commercially exploited in violation of the regulations and the terms of the cooperative agreements. In their statement of reasons for appeal, appellants argue that they are unable to confirm whether the horses seized were subject to cooperative agreements as the horses were taken "to a place far removed from the place of seizure." Appellants also assert that the horses were not commercially exploited. They conclude: "The nature of the decision is such that nothing further need be said * * *. If the officer making the decision has any facts from which he can conclude that the retained horses were used for some commercial exploitation, he must specify and prove them." They request a hearing.

At the outset, we must consider a motion to dismiss filed by the Office of the Solicitor on behalf of BLM and an application to strike filed by appellants. The motion to dismiss is based on appellants' alleged failure to "file a statement of reasons which points out affirmatively in what respect the decision appealed from is in error."

[1] Appellants clearly made no effort to show in what respects the BLM decisions were in error and in fact stated that there was no need to do so. It is well settled that a statement of reasons which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal may be dismissed. Margaret Wallace, 49 IBLA 256 (1980); United States v. Whittaker, 12 IBLA 279 (1973).

Nevertheless, dismissal of an appeal in such circumstances is not mandatory. Each case will be considered on its own merits. In the present case, appellants apparently misunderstood the function of a statement of reasons for an appeal in an administrative appellate proceeding. ^{3/} Moreover, we believe, based on a review of the record, that this case presents substantial questions of law and fact centered on the definition of commercial exploitation. We note that the initial BLM decisions of October 8 and 14, 1980, made no mention of the factual basis for the conclusion of commercial exploitation and the subsequent letters to appellants, dated October 22, 1980, only hinted at some of the legal and factual questions involved.

^{3/} In a "Response to Memorandum of Respondent dated 12/31/80," filed with the Board January 19, 1981, appellants stated at pp. 2-3:

"Appellants had a right to assume that no ex parte communications existed when he drafted his Notice of Appeal. Therefore, the only document respecting the case which appellant had a right to believe was before the Board was the Notice of Appeal and the annexed decision. The decision accused the appellant of making a commercial [sic] use of animals. To create a proper issue for hearing, the appellant denied the commercial use of animals within his Statement of Reasons and, as we view it, the appellant was required to do no more; the decision accuses and the appellant denies, and it then clearly became the duty of the proponent to sustain his accusation."

For those reasons, the appeal is accepted and the motion to dismiss is denied.

In their application to strike, appellants note that, in its "Supplemental Memorandum In Support Of Motion To Dismiss," the Office of the Solicitor makes reference to a "file" containing materials supporting BLM's conclusion of commercial exploitation. Appellants argue that these materials are ex parte communications by the Office of the Solicitor and should be stricken from the record before us because appellants have not had an opportunity to respond to them. They also request copies of such communications.

There have been no ex parte communications by the Office of the Solicitor within the meaning of 43 CFR 4.27(b). The file to which appellants refer is the record in this case, compiled by BLM. It contains no ex parte communications to this Board and has been and will remain open to inspection by appellants pursuant to Departmental policy. 43 CFR 4.4; 43 CFR 2.13(a). Accordingly, appellants' application to strike is denied.

[2] Finally, we turn to appellants' request for a hearing. We believe that the record before us presents substantial issues of fact which merit ordering a hearing pursuant to 43 CFR 4.415. The standard by which commercial exploitation is judged is set forth in 43 CFR 4700.0-5(n) (44 FR 76985 (Dec. 28, 1979)). It provides:

"Commercial exploitation" means using a wild free-roaming horse or burro, because of its characteristics of wildness, for direct or indirect financial gain. Characteristics of wildness include the rebellious and feisty nature of such animals and their defiance of man as exhibited in their undomesticated and untamed state. Uses such as saddle or pack stock or other uses that require domestication of the animal are not commercial exploitation of the animals because of their characteristics of wildness.

Essentially, this definition presents three questions of fact in determining whether there has been commercial exploitation. First, whether the animal is a wild free-roaming horse or burro; second, if it is, whether it has been used because of its "characteristics of wildness"; and third, whether such use was for direct or indirect financial gain.

At the hearing, the Government may present any evidence pertaining to the question of commercial exploitation and will bear the initial burden of presenting a prima facie case thereof. The Government should pay careful attention to identifying what horses were involved in any allegation of commercial exploitation. Appellants will bear the burden of proving by a preponderance of the evidence that such identified horses were not the subject of commercial exploitation.

The Administrative Law Judge to whom the case is assigned will render a decision after the hearing. Any parties adversely affected

shall have the right to appeal to this Board. However, if no appeal is filed within 30 days of receipt of the decision, the Administrative Law Judge's decision will become final without further notice.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Government's motion to dismiss is denied, appellants' application to strike is denied, and it is ordered that the case be referred to the Hearings Division of this Department for further action in accordance herewith.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

